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No. 96-6298

In The

Supreme Court of the United States

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act") on April 24, 1996. The Act's habeas corpus title, *inter alia*, amends 28 U.S.C. § 2254(d). The questions on which the Court granted review are:

I.

Whether the court of appeals correctly concluded that Congress, despite an explicit provision in § 107(c) of the Act, failed to specify the extent to which the Act's habeas corpus revisions are to apply retroactively to pending habeas cases?

II.

If so, whether the court of appeals correctly supplanted this Court's antiretroactivity presumption, triggered by new legal consequences attached to completed events, with a presumption that habeas-curtailing statutes apply retroactively and a test for retroactive effects that requires proof of actual reliance?

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REPLY BRIEF FOR PETITIONER

The court below interpreted the 1996 Act as replacing the previous habeas corpus cause of action, established by (1) custody and (2) a constitutional violation, with a new cause of action requiring proof, in addition, that (3) the state court's adjudication not only was "erroneous" as a matter of federal constitutional law but was "grave[ly]" erroneous.[1] The State and its *amici* admit this,[2] and also that the court of appeals applied its radical reading of the 1996 law to deny Aaron Lindh's 1992 petition on the ground that the state court's resolution of his Confrontation Clause claim "cannot be called 'unreasonable' " even

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[1] JA 181, 182; *Hennon v. Cooper*, 1997 WL 114438, at *5-*6 (7th Cir. Mar. 14, 1997) (circuit decision in "*Lindh* . . . commands deference to the state court's judgment . . . [unless it is] 'unreasonable,' which is stronger than 'erroneous' and may be stronger than 'clearly erroneous' "; relief denied despite "deficient" "reasoning" of state court decision and basis to "think [its] determination incorrect"). The State and its *amici* openly lobby for the lower court's interpretation of § 2254(d). RB 20-24; CJLF 3-16; WLF 2-11. Because the Court expressly excluded the question of the correctness of that interpretation from its grant of certiorari, the devotion to it of half of two briefs is utterly inappropriate. So would it be for the Court to address the issue without first giving Lindh a fair chance through briefing and argument to show that the proffered interpretation is demonstrably incorrect and unconstitutional.

[2] While dwelling on selected features of the writ's history prior to *Johnson v. Zerbst*, 304 U.S. 458 (1938), and on selected contemporary issues that are notably absent from Mr. Lindh's case (such as those addressed by *Teague v. Lane*, 489 U.S. 288 (1989) and harmless-error doctrine, *e.g.*, RB 36; WLF 5-6), none of the opposing briefs disputes for a moment that, "[a]t least since *Brown v. Allen*, 344 U.S. 443 (1953)" and until April 23, 1996, Lindh had an unconditional statutory right to relief from custody based upon a constitutional violation. CJLF 7; see RB 6, 23; WLF 6.

though members of the majority as well as the dissenting judges below "believe" that it was "wrong." JA 197, 203.[3] Because the State and its *amici* disavow the lower court's revisionist interpretation of *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994),[4] substituting their own, reply is required.

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[3] The Confrontation Clause issue is not before the Court, but the State and CJLF address it, misstating the record. RB 2-4; CJLF 29-30. When Dr. Roberts provided the State with its only testimony that Lindh had no mental disease, (1) the State was investigating felony charges against Roberts that had led the State Medical Board to move to withdraw his license and the University Hospital to ask for a criminal investigation (the order in limine forbade questions about the Hospital's suspension of Roberts as well as the State's criminal investigation of him); and (2) Lindh's prosecutor had favored Roberts with a decision *not* to suspend his employment and investigate but instead to continue his retainer on Lindh's case and let someone else investigate. Three months after Lindh's trial, the State reduced multiple felony charges against Roberts to a single misdemeanor to which Roberts pled guilty, and a judge in the same court where Lindh was tried withheld a prison term because of Roberts' services to the State in cases like Lindh's. JA 8-13, 22-44, 76-77, 85, 197, 217.

[4] *E.g.*, RB 37-39 (declining to defend lower court's limitation of "new legal consequences" to frustrated reliance interests); WLF 4, 19-20 (reasonable "means of assessing the potential unfairness to some litigants of applying amended . . . § 2254(d) to . . . pending habeas cases" places Lindh within "categories of habeas petitioners . . . most likely to" deserve to "be exempted" from new law).

The State's "representative sampling" of lower court cases is not. Cf. RB 12 n.4. Four circuits have held that § 2254(d) does *not* apply to pending cases, including *Mackall v. Murray*, 1997 WL 134374, at *4 (4th Cir. Mar. 25, 1997). See Pet. Brf. 11 n.10. Two circuits have applied it. The Eleventh Circuit has reserved the issue. *Hunter v. United States*, 101 F.3d 1565, 1572 n.5 (11th Cir. 1996).

I. The State Misreads *Landgraf*'s Step One to Saddle Congress with an Onerous Redundancy Requirement

Under *Landgraf*, the first step in analyzing the temporal reach of a statute is to determine "whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. The State and *amici* treat the adverb *expressly* as a term of art, meaning "through words taken wholly out of context and without reference to the ordinary rules for reading statements made in the English language." *E.g.*, RB 9-10. We believe, conversely, that the quoted phrase from *Landgraf* means nothing more or less than that a court should begin by considering whether the statutory text explicitly addresses the question of the statute's application to classes of cases defined by temporal criteria, and, if the text does so, the court should obey the manifest English-language meaning of that text.

The text of Title I of the 1996 Act explicitly addresses the question of the applicability of the Act's habeas revisions to classes of cases defined by temporal criteria. Title I enacts two distinct sets of revisions – a new Chapter 154 and several amendments to preexisting Chapter 153 – and then states in § 107(c) that the new "Chapter 154 shall apply to cases pending on . . . the date of enactment of this Act." The meaning of § 107(c) is no less "express" than the meaning of the statement "Give me two large cokes to go, one with ice" – although both statements assume familiarity with normal English usage and a hearer motivated to make sense instead of nonsense of what's said. Congress commonly assumes no less; *Landgraf* certainly demands no more.[5]

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[5] See *United States v. Wells*, 117 S. Ct. 921, 927 (1997) ("first criterion in the interpretive hierarchy, [is] a natural reading of the full text"). Lindh does not "deliberately commingle[ ]" (cf.

RB 10) *Landgraf*'s Step One ("expressly prescribed" temporal scope) and Step Three ("clear congressional intent") but discusses them simultaneously to avoid repetition. Because § 107(c) expressly prescribes Title I's temporal reach – and § 2264(b) expressly prescribes § 2254(d)'s – Step One subsumes Step Three. And were it determined that §§ 107(c)'s and 2264(b)'s treatment of temporal reach were not sufficiently "express," their language pointing in that direction would supply the single most important consideration in the statutory construction that Step Three requires.

Four issues that the State and its *amici* raise in regard to Step Three – none bearing on Step One – deserve mention. (1) Under *Landgraf*, and also as a matter of logic, " 'where the congressional intent is clear, it governs' " in Step Three. *Landgraf*, 511 U.S. at 264. This is true whether Congress' clear intent rebuts the presumption against giving a new law retroactive effect or, *a fortiori*, when there is no " 'timeless and universal' " presumption to be overcome, and Congress' clear intent is to follow the usual rule that new laws apply in the future. *Id.* at 265. Courts accordingly must follow Congress' clear " 'statutory direction' " to apply a new law only in future cases even if the law's application to pending cases would not be "retroactive." *Id.* at 277; accord, WLF 19; cf. RB 10.

(2) The State (RB 12) ignores the explanation for limiting the pending cases governed by Title I to those brought by *capital* prisoners who are given *special litigative resources* in state court. 28 U.S.C. § 2261. By focusing on pending *capital* cases, Congress pinpointed the cases causing a logjam. See Bureau of Justice Statistics, Federal Habeas Corpus Review 16-25 (Sept. 1995) (capital, not noncapital, cases cause delay). By focusing on prisoners given *special resources in state court*, Congress could rely on those resources to neutralize the unfairness that retroactive application would cause – while concluding, as to cases in which extra resources were *not* provided, that "the potential unfairness of retroactive application . . . [is not] an

II. Nothing the State Says or Cites Changes the Fact that Applying Section 2254(d) Would Deprive Lindh of a Matured and Unconditional Cause of Action and Thus Attach New Legal Consequences to Pre-Enactment Events

The State chiefly relies on a single, patently result-oriented proposition – that a new law's effects qualify as

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acceptable price to pay for the countervailing benefits." *Landgraf*, 511 U.S. at 272-73.

(3) What *does* remain unexplained is respondent's rationale for reading 28 U.S.C. § 2264(b) so as to destroy the States' incentive to provide special resources and thus "opt-in" to Chapter 154. For respondent's version of § 2264(b) would concededly deny opt-in States the benefit of the Act's beefed up exhaustion rule, the presumption of correctness of state factfindings, *and* § 2254(d) in the large class of habeas cases in which prisoners rely on "a factual predicate that could not [previously] have been discovered through the exercise of due diligence." *Id.* § 2264(a)(3); see, *e.g.*, *Kyles v. Whitley*, 115 S.Ct. 1555 (1995); *Dobbs v. Zant*, 506 U.S. 357 (1993); *Amadeo v. Zant*, 486 U.S. 214 (1988). Nor does CJLF's comparison of the Powell Commission's § 2259 and the 1996 Act's § 2264(b) explain the latter. Cf. CJLF 19, A-1. To the contrary, this "apples and elephants" comparison simply begs the question why Congress in March and April 1995 – just when it added § 107(c) – dropped the Powell Commission's hearing provision and added an entirely unrelated section incorporating into Chapter 154 three Chapter 153 provisions that by CJLF's own admission apply of their *own* force "in *all* [habeas] cases." CJLF 16. The only imaginable reason – the only one that avoids "emasculat[ing] an entire section," cf. *Bennett v. Spear*, 117 S. Ct. ___, ___, 1997 WL 119566, at *11 (Mar. 19, 1997) – is to make two Chapter 153 provisions, which do not *generally* apply to pending cases, apply to pending *opt-in* cases pursuant to § 107(c).

(4) Despite CJLF's misleading obfuscations (CJLF 17), the partial prospectivity provision in § 903(c) of the Act does not apply to § 108 or any other part of the habeas title (Title I); and it was added by a different House of Congress almost a year after

retroactive "only if the interest harmed by the new law is . . . *deserving*" in the light of the reviewing court's policy preferences. RB 16 (emphasis added). That is not *Landgraf*'s test. *Landgraf*'s Step Two asks whether "events completed before enactment" caused a legal right to have matured or become unconditional as a matter of pre-enactment law, and whether application of a new law would "attach *new* legal consequences" to those pre-enactment events. 511 U.S. at 270 (emphasis added).[6] If so, the new law's application is "retroactive" and impermissible absent "clear congressional intent" – whatever the court's own policy preferences might be. *Id.* at 283.

Here, two crucial facts clearly make § 2254(d)'s application to Mr. Lindh retroactive under *Landgraf*; and the State disputes neither of them: *First*, events occurring no later than July 9, 1992 when Lindh filed his petition (and, possibly, well before then) gave Lindh an unconditional right to relief from custody under the preexisting habeas

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Title I and § 107(c) were finalized. See 142 Cong. Rec. H2187-88 (Mar. 13, 1996); Pet. Brf. 28 n.17.

[6] See, *e.g.*, *Bennett v. New Jersey*, 470 U.S. 632, 639-40 (1985) (determinative retroactivity event is when "pre-existing right to recovery" " 'had matured or become unconditional' "); *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (when individual acquired "affirmative enforceable right"); *Bradley v. School Bd.*, 416 U.S. 696, 720 (1974) ("The Court has refused to apply an intervening change to a pending action where . . . do[ing] so would infringe upon or deprive a person of a right that had matured or become unconditional."); *Greene v. United States*, 376 U.S. 149, 153, 160 (1964) (when "petitioner's rights . . . matured and were asserted"); *United States v. Magnolia Petr. Co.*, 276 U.S. 160, 162 (1928) (when "claims fixed in accordance with earlier provisions"); *Crane v. Hahlo*, 258 U.S. 142, 145 (1922) (when right to relief "became complete"); *United States Fidelity & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 315 (1908) (when "respective rights of the parties [were] settled").

statute. For nothing thereafter could occur (under pre-Act law) that would attach to his unconstitutional custody any legal consequence but federal habeas relief. And, *second*, to apply amended § 2254(d) as interpreted below would attach the *opposite* legal consequence, because § 2254(d) more "narrowly limited the circumstances in which a federal habeas court may grant relief" (RB 21) by giving the State a " 'modified res judicata' " defense (CJLF 15) that "substantially alters [Lindh's] federal habeas 'cause of action' " (WLF 17).

Apart from appealing to policy preferences, the State offers only three arguments for exempting § 2254(d)'s new legal consequences from the *Landgraf* rule: (1) that the presumption against giving retroactive effect to rules of decision enacted by supervening statutes is limited to rules affecting "primary conduct" rather than "secondary conduct" – and a remedy for the unconstitutional acts of another court is ineluctably "secondary" (RB 25, 34); (2) that some other label – "procedural," "jurisdictional," "prospective" – applies to § 2254(d) and exempts it from the *Landgraf* rule (RB 24-32); and (3) that the "event[ ] completed before . . . enactment" to which § 2254(d) attaches new legal consequences occurred *earlier* than Lindh suggests (RB 32). Each argument is taken up below.

A. The Habeas Remedy for State Court Constitutional Violations Is No Less Protected by Non-retroactivity Norms than Statutory Remedies for Other Harms

The State and *amici* badly mischaracterize the role of state court decisions in federal habeas proceedings both before and after the 1996 Act. They portray amended § 2254(d) as dealing with "secondary conduct" because, in their view, the habeas statute merely apportions responsibility for remedying a legally cognizable harm

between state and federal court adjudication.[7] In this depiction, " '[p]rimary conduct' is the conduct of people in the ordinary course of life . . . [– i]n the present case, . . . Aaron Lindh entering the City-County Building with a gun," whereas " '[s]econdary conduct' is the conduct of adjudication . . . [– i]n the present case, . . . Lindh's trial." CJLF 23-24.

But of course the *primary* conduct in a federal habeas case is precisely the state court adjudication that places a petitioner "in custody in violation of the Constitution." 28 U.S.C. § 2241(c)(3). The petitioner's right to federal habeas relief is created by, and depends solely upon, the entry of an unconstitutional state court adjudication subjecting him or her to incarceration. Federal habeas courts in state prisoner cases "have never been" concerned with adjudicating guilt or with the legality of any other sort of "primary conduct" than the state court commitment order which is the basis for a petitioner's imprisonment. *Herrera v. Collins*, 506 U.S. 390, 400-01 (1993).

Both before and under the 1996 Act, the writ has provided a remedy for unconstitutional actions occurring in the process of state court adjudication leading to a petitioner's incarceration. That adjudication thus cannot *stand in for* the federal habeas remedy, any more than USI Film Product's disregard of Barbara Landgraf's "complaints to her immediate supervisor" that another

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[7] They do not carry this conception to the next logical step of arguing that laws which alter a court's standards for reviewing its own or another court's actions may never affect "primary" conduct or matured rights protected by antiretroactivity norms. That step would make the basic flaw in their category structure too obvious, in the light of cases like *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447, 1456 (1995) (new law changing circumstances under which judge could reopen lawsuit held unconstitutionally "retroactive").

employee was harassing her could stand in for her Title VII remedy. See *Landgraf*, 511 U.S. at 248.

There is another reason why the State's argument won't wash. Even were the writ a remedy for some legally redressable "primary conduct" other than the state court's unconstitutional adjudication, and even were the state court's adjudication a prior and overlapping remedy for that conduct, a new law's application to revoke the second remedy in a case in which the prior remedy previously had been available would still be "retroactive" under *Landgraf*.[8] An example makes the point. Assume that C citizen's property is seized by federal agents at a time when federal statutes provide two alternative remedies for unlawful seizures: an action in the district court for return of the property (with a six-month statute of limitations) and an action for money damages for unreturned property in the Court of Claims (with a three-year statute of limitations). Then, two years after the seizure of C's property, Congress enacts a new statute, silent on the issue of retroactivity, that (i) shortens the statute of limitations for the Court of Claims action to

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[8] *Landgraf* itself held that a compensatory damages remedy is a new legal consequence though it overlaps an existing backpay remedy, because compensation might be awarded when backpay is not. 511 U.S. at 281-83. And Congress would not be presumed to withdraw such a remedy retroactively, any more than to add one, by a statute that was silent on the issue. See *id.* at 284 n.36; Pet. Brf. 40 n.29. And the fact that a discrimination victim had unsuccessfully pursued a statutory right to backpay in the EEOC prior to suing in court to enforce the same right would not neutralize the retroactive effect of applying a new law to withdraw the judicial right of action after administrative remedies were exhausted and a complaint was filed in court. See, *e.g.*, *Rafferty v. City of Youngstown*, 54 F.3d 278, 284 n.3 (6th Cir. 1995); *Maitland v. University of Minnesota*, 43 F.3d 357, 362-63 (8th Cir. 1994).

18 months, or (ii) limits recovery of damages in the Court of Claims action to cases in which the agents who seized the property not only seized it unlawfully but were unreasonable in believing that they had a lawful basis for the seizure. The destruction of an "accrued" and "existing cause[ ] of action" by hypothesized change number (i) is, of course, a paradigmatic case of the kind of new legal consequence that Congress is presumed *not* to intend.[9] And the destruction of an accrued right of action by hypothesized change number (ii) is indistinguishable from that worked either by change number (i) or by applying the 1996 Act to deny Mr. Lindh's 1992 petition. See, *e.g.*, *Greene v. United States*, 376 U.S. 149, 160-63 (1964); Pet. Brf. 40-42 & nn.29, 33.[10]

Although the State and its *amici* cite cases they say would require the application of hypothesized changes (i) and (ii) to destroy matured causes of action, they can do so only by not stating the facts (*e.g.*, RB 29-31) or misstating them (CJLF 23, 26-27). For example, *Bruner v. United States*, 343 U.S. 112 (1952), dismissed a pending overtime-pay suit in the district court on the basis of a new law confining such suits to the Court of Claims only after finding – both as to the class of such cases *and* as to Bruner's *own* case – that "Congress has not altered the

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[9] *United States v. St. Louis, S.F. & T. Ry.*, 270 U.S. 1, 3 (1926); see, *e.g.*, *Fullerton-Krueger Lumber Co. v. Northern Pac. Ry.*, 266 U.S. 435, 437 (1925); *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596, 598 (1873).

[10] It makes no difference that C thus far has not received relief because s/he has not yet sought it, while Lindh thus far has been denied relief because of a constitutional error committed when he did seek it. In both cases, prior law made the absence of relief a prerequisite to the remedy that the new law withdraws.

nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities." *Id.* at 117. Similarly, in *Hallowell v. Commons*, 239 U.S. 506 (1916), the Court applied a supervening law in dismissing a pending suit to declare Hallowell the heir of a deceased Native American only after finding that the law substituted a new, administrative route to the same relief and thus had "not extinguish[ed] any liability incurred under" the former law or "take[n] away [a] substantive right, but simply change[d] the tribunal that is to hear [Hallowell's] case." *Id.* at 508. And in *Crane v. Hahlo*, 258 U.S. 142 (1922), the Court upheld the application of a new law changing the process of reviewing an assessor's decision from one set of judicial and administrative remedies to another only after finding that "a substantial and efficient remedy *remains*." *Id.* at 146-47 (emphasis added).[11] The principle that no new legal

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[11] See also *Republic Nat'l Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring in part) (retroactivity concerns are absent where law "speak[s] to the power of the court, *rather than* to the rights or obligations of the parties" (emphasis added)); *Bell v. New Jersey*, 461 U.S. 773, 777 n.3, 782 n.7 (1983) (new law applies when it "merely change[s] the forum for assertion of a pre-existing right" and " 'takes away no substantive right' "); *Smallwood v. Gallardo*, 275 U.S. 56, 61-62 (1927) (new law applies to bar federal suit challenging local tax because law "is not like a provision that *no action* shall be brought upon a contract previously valid, which in substance would take away a vested right," but instead "leave[s] the taxpayer with[ ] power to resist" the tax in local courts (emphasis added)); *Sherman v. Grinnell*, 123 U.S. 679, 680 (1887) (new law applied because petition it barred "was not brought until after [new law] went into effect" and state forum remained); *Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 573-74 (1870) (dismissing suit filed directly in federal court because plaintiff could litigate same suit in state court or in federal court

consequence occurs when Congress replaces the remedy that was available in the past with a "substantial and efficient remedy [that] *remains*" does not countenance – rather, it affirmatively forbids – amended § 2254(d)'s application to annul entirely *any* "remain[ing]" remedy for Aaron Lindh's matured cause of action.

B. Section 2254(d) Is Not Procedural, Jurisdictional or Prospective, Nor Would its New Legal Consequences Be Permissible if it Were

As *Landgraf* makes abundantly clear, it does not adopt a jurisprudence of labels – "procedural," "jurisdictional" or "prospective" – but instead a functional test that asks whether or not new legal consequences would attach to completed events.[12] Accordingly, even if any of those labels applied here – none do – the State's effort to affix them to § 2254(d) would be pointless. For each is operative for retroactivity purposes only if it is read correctly – namely, "*merely* procedural," "*merely* jurisdictional" or "*merely* about prospective relief" (since any statute abrogating a matured cause of action completely

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on removal from state court); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868) (new law applied to withdraw Court's power to hear habeas appeal because Congress clearly intended to affect pending cases and constitutional objections were met by Court's continuing jurisdiction to hear such cases on original writ).

[12] 511 U.S. at 270, 274 n.27, 275 n.29; see also *id.* at 291-92 (Scalia, J., concurring in the judgment). In Justice Brandeis's words, "[t]hat a statute shall not be given retroactive effect, unless such construction is required by explicit language . . . is a rule of *general* application [which] has been applied by this court to statutes governing procedure. . . . " *United States v. St. Louis, S.F. & T. Ry.*, 270 U.S. at 3 (emphasis added); see Amicus Curiae Brief for the United States at *16 & n.8, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 1996 WL 744847 (No. 95-1340).

also has the procedural effect of destroying the jurisdiction of the previously cognizant court to afford relief on that cause of action in the future). And the change in law worked by amended § 2254(d) as construed below is self-evidently not *merely* any of these things.

Not "merely procedural." The State and its *amici* themselves rule out any characterization of § 2254(d), as interpreted below, as "merely procedural," because thus interpreted it "admittedly reduces the likelihood that a habeas petitioner will be granted relief" (RB 12) by creating a " 'modified res judicata' " defense[13] (CJLF 15), which "substantially alters the federal habeas 'cause of action' " (WLF 17). As the Court has long recognized, the creation or withdrawal of defenses to matured causes of action and all similar changes are both "substantive" and "retroactive." See, *e.g.*, *Winfree v. Northern Pac. Ry.*, 227 U.S. 296, 301-02 (1913).[14]

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[13] " 'Res judicata is an affirmative defense. . . . ' " *Hagen v. Utah*, 510 U.S. 399, 409 (1994).

[14] The State asserts that new "standards of review" are procedural and can change without imposing new legal consequences. RB 26. The only case it cites, however, *United States v. Mejia*, 844 F.2d 209 (5th Cir. 1988), applied a new *judicial* precedent reversing an old one, *id.* at 211, thus simply illustrating the " 'familiar' " principle, that, while "statutes operate only prospectively, . . . judicial decisions operate retrospectively." *Rivers v. Roadway Express*, 511 U.S. 298, 311-12 (1994). As the cases cited in Lindh's opening brief at 41-42 n.33 make clear, this Court and the lower courts have consistently treated standards of review as substantive, not only for retroactivity but also for *Erie* purposes. See also, *e.g.*, *Gasperini v. Center for Humanities*, 116 S. Ct. 2211, 2221 (1996) (*Erie* case); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 540 n.15 (1958) (same); *Baines v. Swenson*, 384 F.2d 621, 623 n.3 (8th Cir. 1967) (refusing to apply new statutory standard of review *on habeas* of state court factfindings because "federal petition was filed

Not "merely jurisdictional." Even were § 2254(d) jurisdictional, it would not fall within the Court's retroactivity cases addressing "*merely* jurisdictional" changes, such as *Bruner*, *Hallowell*, and *Crane*. For as we demonstrate above, applying the court of appeals' interpretation of § 2254(d) to Lindh's 1992 petition does not "*merely*" replace the existing remedy for his matured cause of action with a new, "substantial and efficient remedy." *Crane*, 258 U.S. at 147. Rather, it entirely "takes away" any remedy. Cf. *Hallowell*, 239 U.S. at 508.

In any event, "§ 2254(d) is not, in fact, a jurisdictional statute" (WLF 19) – as every court of appeals to address the issue has held.[15] When the habeas statute (pre- and post-1996) intends to withdraw jurisdiction, it does so explicitly through language such as "[n]o circuit or district judge shall be required to entertain," 28 U.S.C. § 2244(a), and "no Federal court thereafter shall have the

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before" new law was enacted); *McDonald v. Kropp*, 373 F.2d 549, 556 n.1 (6th Cir. 1967) (similar). Nor does the immediate application of the 1919 harmless error law avail the State. Cf. CJLF 25. Rather than imposing *new* legal consequences, the 1919 law codified the Court's longstanding harmless error rule, from which some lower courts recently had deviated. Compare *Tevis v. Ryan*, 233 U.S. 273, 289 (1914) (affirming judgment computing damages erroneously because "error was harmless . . . [and] rule adopted made no substantial difference in the result") and *Markham v. United States*, 160 U.S. 319, 325 (1895) (similar) with Rep. of ABA Spec. Comm. to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, 2 A.B.A. J. 603, 605 (1916) (proposing harmless error statute to bring practice in aberrant circuits into line with traditional "American rule").

[15] See, *e.g.*, *Davis v. Executive Dir.*, 100 F.3d 750, 755 n.1 (10th Cir. 1996); *Farmer v. McDaniel*, 98 F.3d 1548, 1549 n.1 (9th Cir. 1996); *Rehbein v. Clarke*, 94 F.3d 478, 481 n.4 (8th Cir. 1996); *Emerson v. Gramley*, 91 F.3d 898, 900 (7th Cir. 1996).

authority," *id.* § 2262(c). Section 2254(d) uses no such language. Rather, § 2254(d)'s terms are borrowed *verbatim* from the neighboring – *non*jurisdictional – exhaustion provision, § 2254(b).[16]

Not "merely prospective." Similarly, the State and its *amici* cannot sensibly call the writ "prospective" while conceding that "[t]he essence of habeas corpus . . . is that the petitioner asks the court to nullify a *previous* decision."[17] CJLF 5. Nor is § 2254(d) itself prospective but, instead, "quintessentially backward-looking." *Landgraf*, 511 U.S. at 282; see § 2254(d) (relief depends on whether "a *State court* . . . adjudication . . . *resulted* in a decision that *was* contrary to . . . established Federal law").

The single case on which the State and *amici* rely – *American Steel Foundries v. Tricity Cent. Trades Council*, 257 U.S. 184 (1921) – seals the point. As it clearly explains, laws affecting injunctions do not attach new legal consequences to "events *completed before* [their] enactment" (*Landgraf*, 511 U.S. at 270) "because . . . [an] injunction operates in futuro and the right to it must be determined as of the *time of the hearing*." *American Steel Foundries*, 257 U.S. at 201 (emphasis added); see Pet. Brf. 41 n.32. Because injunctions depend on conditions in existence at

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[16] Sections 2254(b) and (d) both provide that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless [certain conditions are met]." See *Granberry v. Greer*, 481 U.S. 129, 131 (1987) (exhaustion statute is nonjurisdictional); cf. *Felker v. Turpin*, 116 S.Ct. 2333, 2338 (1996) (rule that jurisdictional "[r]epeals by implication are not favored" applies to 1996 Act).

[17] See, *e.g.*, *Pitchess v. Davis*, 421 U.S. 482, 489-90 (1975) (*per curiam*) (federal habeas court may order state court to correct prior invalid conviction by retrying or releasing petitioner but may not supervise state court's compliance with order as if it were an injunction); cases cited in Pet. Brf. 48-49 & n.40.

the moment they are issued, and may be modified or terminated whenever conditions change, neither the right to obtain one nor the right to keep one in force can "mature[ ] or become unconditional" until the moment the court acts. As we emphasize in the next section, the same is *not* true of Lindh's preexisting right to habeas relief – nor do the State and its *amici* claim that it is.

C. Applying Section 2254(d) as Read Below Would Attach New Legal Consequences to "Events Completed" Before Enactment on Either of the Two Admissible Understandings of the Events that Made Mr. Lindh's Rights Mature and Become Unconditional

The State criticizes Lindh because, it says, he specifies the filing of his petition, rather than "the date of an adverse state court decision" (RB 32), as the completed, pre-Act event to which the application of amended § 2254(d) would attach new legal consequences. The State misunderstands Lindh's position.

There are a number of conditions precedent to the maturing of a habeas cause of action. See Pet. Brf. 48-49. Two of those conditions are satisfied by actions of the petitioner and the courts: (1) entry of an unconstitutional state court adjudication subjecting the petitioner to incarceration – which simultaneously satisfies the "constitutional violation" prerequisite to habeas jurisdiction, 28 U.S.C. § 2241(c)(3), and the exhaustion of remedies prerequisite to habeas relief, § 2254(b); and (2) this Court's denial of certiorari or the expiration of the time for seeking it – which eliminates the exclusive alternative of a merits ruling on certiorari that would bar subsequent habeas consideration of any decided claim under

§ 2244(c).[18] A third possible condition precedent is the existence of "custody," which satisfies the final prerequisite for habeas jurisdiction, § 2241(c)(3), and makes habeas corpus causes of action – unlike most others – dependent upon a condition that is alterable up to the moment the petition is filed but not thereafter. See *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (habeas "jurisdiction . . . attache[s]" if petitioner is in custody when "application was filed" and "is not defeated by [petitioner's subsequent] release").

In most cases (including Lindh's), these conditions are satisfied in the order described – so that the latest point at which the cause of action can be said to have matured and become unconditional is when an individual in custody files his or her petition. In some cases, however, filing *precedes* the exhaustion of state remedies, *e.g.*, *Sharpe v. Buchanan*, 317 U.S. 238, 238-39 (1942) (remanding for merits adjudication of petition that became exhausted in state court while federal case was pending on appeal), or, at least, the denial of certiorari or the expiration of the time for seeking it (as when a prisoner files a habeas petition within weeks of the state direct appeal decision).

The operation of the habeas statute thus permits only two sensible understandings of the point at which the habeas cause of action has " 'matured or become unconditional.' " *Bennett v. New Jersey*, 470 U.S. at 639. *Either* the determinative "events [are] completed" (*Landgraf*, 511 U.S. at 270) when state remedies have been exhausted and certiorari has been denied (or the time for seeking it has expired). *Or alternatively*, the determinative events are completed when, in addition to the exhaustion of state remedies and the denial of certiorari, the "custody" prerequisite has been satisfied by the filing of the petition

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[18] The cited statutes are reproduced in Pet. Brf., App. A.

while the petitioner is under restraint. Only under the latter approach would filing usually (although not always) mark the point when the determinative "events [are] completed"; and, even then, it would not be the filing *per se* but the conjunction of the filing and custody that is decisive.

Both approaches provide a bright line that is administrable on the face of any petition that conforms to the Rules Governing § 2254 Cases. The first approach (exhaustion and denial of certiorari) has the added virtues of being (1) consistent with the Court's established "finality" jurisprudence under *Teague v. Lane*, 489 U.S. 288, 305 (1989), (2) independent of the contingencies of filing and of custody's susceptibility to mooting circumstances beyond the control of the petitioner and the courts (*e.g.*, parole decisions), (3) productive of the same outcome as the different formulation of the decisive retroactivity event in Justice Scalia's concurring opinion in *Landgraf*,[19] and (4) coherent with the roles of certiorari

[19] Justice Scalia focuses on the "relevant activity that the [*new*] rule regulates" as revealed by the rule's "purpose." 511 U.S. at 291 (Scalia, J., concurring in judgment). As interpreted below, § 2254(d)'s purpose is to accord "deference" to state adjudications of a certain type – *i.e.*, adjudications "on the merits" that, even if "wrong," are not "grave[ly]" so. § 2254(d); JA 197, 181; see WLF 18 (§ 2254(d)'s "clear purpose . . . is to place more responsibility in the hands of the state courts, in adjudicating claims of constitutional violations," and "by placing greater trust in the state courts, . . . [to] make it even more likely that those state courts will vigorously protect the constitutional rights of their citizens" and that "this Court [will do the same] on writ of *certiorari*"). Under Justice Scalia's approach, therefore, the relevant events are the state court's provision of the specified type of adjudication and the immunization of that adjudication from revision by this Court.

and habeas as alternative remedies[20] – one discretionary with the Court, one a matter of right – concerned with rectifying identical constitutional violations occurring in the course of state court adjudications, with the habeas as-of-right remedy becoming unconditional when the alternative discretionary remedy ceases to be available.

The alternative approach (exhaustion, denial of certiorari, and the conjunction of custody and filing) has none of these virtues. It does, however, conform to the "cases pending" line in § 107(c) and to a number of the Court's retroactivity precedents.[21]

[20] See, *e.g.*, *Reed v. Farley*, 114 S. Ct. 2291, 2297 (1994); *Wills v. Texas*, 511 U.S. 1097 (1994) (O'Connor, J., concurring in the denial of certiorari); *Spencer v. Georgia*, 500 U.S. 960 (1991) (Kennedy, J., concurring in the denial of certiorari).

[21] In a number of cases cited by *Landgraf* as authoritative, the new law in question postdated some formal action taken by a party to effectuate a cause of action, and the court said or implied that the right's formal "assert[ion]" was the event to which the new law would attach new legal consequences. *Greene v. United States*, 376 U.S. at 153, 160 ("petitioner's rights matured and were asserted" upon filing of administrative petition); see *Bennett v. New Jersey*, 470 U.S. at 637, 639-40 (government's claim " 'had matured or become unconditional' " when it issued "determination letter" demanding that grantee return money); *United States v. Magnolia Petr. Co.*, 276 U.S. at 162 (taxpayer's "claims [became] fixed in accordance with earlier [statutory] provisions" when it filed demand for repayment of excessive taxes); *United States Fidelity & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. at 315 ("respective rights of the parties [were] settled, and the cause of action [was] already in existence" when subcontractor demanded payment from contractor); *Dash v. Van Kleeck*, 7 Johns. 477, 479-80, 483-84, 494 (N.Y. 1811) (Kent, C.J.) (adopting view that "plaintiff at the commencement of his suit, had a vested right of recovery against [defendant]"); see also *Sherman v. Grinnell*, 123 U.S. at 679-80 (no retroactivity problem where petition that new law

The Court needs not choose between these alternatives in order to decide this case. Under either, Aaron Lindh's habeas corpus cause of action matured and became unconditional at least four years before § 2254(d) became law.

CONCLUSION

The Court should reverse the decision of the court of appeals.

Respectfully submitted,

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forbade litigant to file "was not sued out . . . until April 8, 1887, which was after [the March 3, 1887] statute").